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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1076

DEANE HILL COUNTRY CLUB, INC. and All of Its Members, Claimants (13 Coin-Operated Gaming Devices and Their Coin Contents),
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Deane Hill Country Club, Inc. and all of its members, claimants to the 13 coin-operated devices, and their coin contents, with which this case is concerned, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on March 23, 1965.

OPINION BELOW

The opinion of the United States District Court appears on page 21a of the Main Brief on Behalf of Claimants-Appellants with Appendix, filed in the United States Court of Appeals for the Sixth Circuit.

The judgment of the United States Court of Appeals for the Sixth Circuit is annexed hereto as an appendix on page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 23, 1965. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Did the District Court and the Court of Appeals err in refusing to suppress the evidence obtained under a search warrant when the machines and their contents were seized?

(2) Did the Court of Appeals err in holding that there was a violation of Section 7302, Internal Revenue Code of 1954, as amended, such as to authorize forfeiture of the articles in question?

(3) Did the Court of Appeals err in refusing to hold acceptance by the government of the tax, penalties and interest due on the machines, and the issuance of an occupational stamp covering the machines and their operation, after their seizure, constituted a waiver and estoppel of the right to forfeit?

(4) Did the Court of Appeals err in holding that the machines were so identified as to be subject to forfeiture?

(5) Were the machines being used in a "business" or "trade", so as to make petitioners liable for the occupational tax?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4 to the Constitution of the United States:

> "*Unreasonable searches and seizures.*—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES INVOLVED

The following statutes are involved:

Title 26, U.S.C., Sections 4461(a)(2) and (3), 4462(a)-(2)(A), 4901(a) and (b), 7301(a), and 7302. These statutes insofar as applicable are annexed hereto as an appendix on page A3, *et seq.*

STATEMENT

This is a proceeding *in rem*, wherein the United States filed a libel of information against 13 coin-operated devices and their monetary contents, seeking their forfeiture for a violation of Sections 4461(a)(2) and 4462(a)(2)(A), Internal Revenue Code of 1954, as amended, for their alleged use without the $250.00 occupational stamp having been paid for each machine. The libel of information avers the

machines were operated in violation of Sections 4461 and 4901 I.R.C., 1954, as amended, and subject to forfeiture under Sections 7262 and 7302, I.R.C., 1954, as amended.

An intervening petition and claim was filed by petitioners averring: (1) that the search under a warrant, and seizure of the machines, was unlawful and illegal and the machines were not subject to forfeiture because they were not contraband; (2) that the machines were not being used in violation of any sections of the Internal Revenue Code; and (3) that the machines were not used in a "trade" or "business" as described in the statutes so as to require the $250.00 tax for their operation.

On September 30, 1962, a special agent of the Intelligence Division, Internal Revenue Service, was on premises of petitioners' country club as an invited dinner guest of a member of the country club. While on the premises, the agent took it upon himself to roam and snoop in and about the club premises other than the dining room where he was an invited guest, and he trespassed upon the club premises by entering a room plainly marked by signs, that "Club Members Only" were admissible. While so trespassing, the agent watched persons operating coin-operated machines. He had no search warrant on this occasion. He placed no identifying marks on the machines which he saw in operation. He testified he could not say whether the machines sought to be forfeited at the trial were the same machines he saw in operation.

The occupational tax and the stamp in question is a location tax and stamp, in that one stamp is issued for the operation of the number of machines to be operated on a certain location, and an individual stamp is not issued for each machine. If one machine breaks down, the location may substitute another machine under the same stamp. The day after the agent observed the machines in operation,

he checked with the District Director, Internal Revenue, at Nashville, Tennessee, and received information that the occupational tax had not been paid on the machines at the club. The club premises are in Knoxville, Tennessee, but this agent went to a commissioner in Chattanooga, Tennessee, to obtain a search warrant, and under it seized the machines in question.

On August 31, 1962, approximately one month prior to the time the agent saw the machines in question while a guest, a check in the amount of $3,000.00 had been made out to pay for the occupational stamp, but inquiry had been made of the Internal Revenue office in Knoxville and it was determined that this check was in excess of the tax due. A second check was then made out, but through inadvertence the bookkeeper at the club failed to mail the check.

On October 4, 1962, the date of the seizure, representatives of petitioners went to Nashville, Tennessee and conferred with agents of the Intelligence Division, Internal Revenue Service, and were instructed by this agent to go to the Collector's Office and pay the tax, and this was done. The Collector accepted the tax, interest and penalties and issued a receipt and a stamp covering the machines in question for the tax period in question.

At the trial, the evidence showed that on previous occasions petitioners had been delinquent in payment of the tax and no seizure was made, but the petitioners were simply called upon to pay the tax, interest and penalties, and this was done.

Form 11-B, which is the special tax return required to be made on the machines in question, contains "instructions" to the taxpayer, stating that the law provides penalties for late filing of the return and interest for late payment of the tax.

In addition to the sign on the door to the room where the machines were located, prohibiting entry by other than club members, there was a printed sign on each of the machines which read as follows:

> "TITLE AND OWNERSHIP OF THIS MACHINE IS INVESTED IN THE ENTIRE MEMBERSHIP OF DEANE HILL COUNTRY CLUB. ONLY MEMBERS ARE ALLOWED TO PLAY THIS MACHINE. THE CONTRIBUTIONS MADE THRU THE PLAYING OF THIS MACHINE SHALL BE USED TO FURTHER THE DEVELOPMENT OF OUR CLUB AND ITS FACILITIES, TO PROVIDE ENTERTAINMENT AND TO BE USED FOR THE BENEFIT OF MEMBERS OF DEANE HILL COUNTRY CLUB. MEMBERS ONLY ARE ALLOWED TO PLAY THIS MACHINE. NON-MEMBERS AND GUESTS ARE NOT ALLOWED TO PLAY THIS MACHINE."

The machines were owned by the membership of the club and the proceeds were used for the benefit of the membership and improvement of the club and its facilities.

Motion to suppress the evidence, based upon the illegal search by special agent Leibowitz in view of his obtaining information for the search by trespass, was filed and overruled, and the action of the trial court in overruling the motion to suppress was affirmed by the Court of Appeals.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred in holding:

(1) That the search warrant under which the machines were seized was valid, and they could have been seized without a warrant, and petitioners were not entitled to their return, if the search were illegal, because the machines were contraband;

(2) That Section 7302, I.R.C., 1954, as amended, authorizes forfeiture of the machines;

(3) That acceptance by the government of the tax, penalties and interest after seizure did not constitute a waiver and estoppel of a right to forfeit;

(4) That the machines were so identified as to be subject to forfeiture; and

(5) That the machines were being used in a "business" or "trade" so as to make petitioners liable for the occupational tax.

REASONS FOR GRANTING WRIT

The Court of Appeals, in spite of the fact that the Internal Revenue agent was a trespasser, held this agent had probable cause, based on his own observations, and even though he were a trespasser could have seized the machines without a search warrant, and that if the search were illegal, petitioners were not entitled to the return of the article because they were contraband. The Court of Appeals also held that intent to defraud was not a necessary element to establish violation of the statutes. The Court of Appeals also states in this opinion:

> "The other questions raised do not in our opinion merit discussion."

The Court of Appeals summarily refused to rule on the other questions raised.

The questions presented here are substantial ones, in that the decision of the Court of Appeals in the instant case is contrary to decisions of this Court and to decisions of the Sixth Circuit. The refusal of the Court to pass on the other questions raised, constitutes a denial to these peti-

tioners of due process. A decision on some questions was important to these litigants and to all others similarly situated, because they were questions of first impression upon which a Court has not ruled. We submit that an appellate court denies the litigant due process of law when it simply states that it is going to ignore a question because it is the opinion of the court that the question does not merit discussion, and gives no citation of authority for such arbitrary refusal to discuss the questions raised. The action of the Court of Appeals in arbitrarily refusing to review the other questions precludes a review in this Court. If a Court may summarily give an arbitrary opinion such as that given here by the Court of Appeals, then all opinions could simply state, "The questions raised do not in our opinion merit discussion. Affirmed."

It is important to these litigations and all other litigants that the Court of Appeals pass on questions raised because, as this Court knows, in most cases filed here certiorari is denied, thus leaving the opinion of the Court of Appeals as the law of the land.

The opinion of the Court of Appeals overlooks the admitted facts of the case, which were that the Internal Revenue agent, when he saw the machines in operation, was a trespasser. There was a sign on the entrance door where the machines were located, which read: "Members Only". The Court of Appeals holds that the fact the door was open to this room when the agent entered, and the fact that no one had ever been ejected from the room but had only been stopped from playing, justified the revenue agent's illegal and unlawful entry. This Court has held that entry by stealth is equivalent to an entry by force, insofar as illegal search is concerned. *Gouled* v. *U. S.*, 255 U.S. 298. The Sixth Circuit held in *Bush* v. *U. S.*, (1960) 283 F.2d 51, that information obtained by a trespasser constitutes entry by

stealth and renders the search unreasonable and void, as being in violation of the Fourth Amendment. The search warrant in the present case was predicated entirely upon what the agent saw through his trespass, and all evidence obtained by him through this illegal entry should have been suppressed. The Court of Appeals states that "the Agent, having observed the illegal operation, could have seized the machines without a warrant." The fact remains, however, that he did not seize the machines at the time, but seized them later under a warrant.

The Court of Appeals held further that had the search been illegal petitioners were not entitled to return of the machines because they were contraband. In none of the Internal Revenue statutes pertaining to the occupational tax involved herein on the machines is it provided that such machines are subject to forfeiture if the tax is not paid. The tax imposed by Sections 4461(2) and 4462(a)(2)(A), Title 26, U.S.C., is a location tax and not one on each machine, and the machines are interchangeable on the same tax stamp when one breaks down. The machines here are not like illegal distilled spirits or narcotics where the tax is imposed on the thing itself. The tax is on the owner or operator of the premises for the number of devices that the owner or operator desires to operate. Furthermore, Form 11-B, which is filed in the record as Exhibit 9, states: ". . . The law provides penalties for late filing of a return and interest for late payment of tax . . .", showing that neither Congress nor the Internal Revenue by its regulations intended there would be a forfeiture of any machine and its contents except for a *willful* violation.

Section 7301(a), Title 26, U.S.C., which is the section upon which this libel was predicated, provides in part as follows:

> "(a) Taxable articles.—Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person . . . *with design to avoid payment of such tax . . . with intent to defraud the United States of such tax or any part thereof*, may be seized, and shall be forfeited to the United States." (Emphasis ours).

Before the machines could be forfeited herein, we submit the government was required to prove that they were used "with design to avoid payment of such tax", and "with intent to defraud the United States of such tax". It is undisputed in this case that the machines were not so possessed and used. The government admitted this. Furthermore, the libel of information charged that petitioners possessed and used these machines "with intent to defraud the United States of the special tax". We submit the burden was on the government to prove intent to defraud the government of the tax due by petitioners. *D'Agostino* v. *U. S.*, (C.C.A. 9, 1958) 261 F.2d 154, cert. denied 79 S. Ct. 739, 359 U.S. 953. The Court of Appeals held in the instant case that "intent to defraud was not a necessary element to establish violation of the statutes".

On the date the machines were seized, the government accepted payment of the tax covering the machines as of September 5, 1962, which preceded the date when the trespassing revenue agent saw the machines in operation (September 30, 1962), and the seizure of the machines October 4, 1962, and licensed these machines until termination of the following fiscal year, to-wit: June 30, 1963.

The Court of Appeals entirely overlooked the question that one of the machines seized by the government was set aside to be used for spare parts and was not even in operation when the agent trespassed and saw machines in

operation. Clearly, the Court of Appeals' decision is erroneous in this respect.

This is a proceeding in admiralty, which means that the machines and their contents were proceeded against rather than an individual, and the theory is that the machines were violating the law. It was incumbent upon the government to prove by a preponderance of the evidence that the machines described in the libel of information were the ones used when the revenue agent trespassed and made his obversation. On the trial, the agent testified:

> "Q. But you can't say they were the same machines, can you, Mr. Leibowitz?
>
> A. No, sir, I cannot say they were the identical machines but they were the same type of machines and the same number of each type."
>
> (61a, Main Brief and Appendix, Court of Appeals.)

Thus, the government was unable to identify the machines as being the ones which the agent said were used to violate the Internal Revenue statutes. We conceive this to be a fatal error in the government's proof.

The $250.00 occupational tax with respect to each machine is imposed upon one who is using said machines in a "trade" or "business". Petitioners reluctantly raised this question because they have always willingly paid this tax. The question is important, however, to operators of all country clubs throughout the United States. There has never been a judicial decision made on this question and the Court of Appeals has refused to give a decision. The machines in question here were owned by the entire membership of the country club and were used solely for the improvement of the club and its facilities, and no individual profited from the operation of the machines. It is our view that the tax due under Section 4901, Title 26, U.S.C., was

meant by Congress to be imposed upon individuals who owned a "trade" or "business" and where the machines were used for personal profit, and that Congress did not intend that the tax be imposed where such machines were used solely for the purpose of upkeep and improvement of country club facilities.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted:

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